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Supreme Court of the United States

OCTOBER TERM, 1960

No. 332

STANDARD DREDGING CORPORATION,
Appellant

versus

STATE OF ALABAMA,
Appellee

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS AND MOTION TO AFFIRM

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MOTION TO DISMISS AND MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of Alabama in this cause be affirmed on the ground that the questions which are presented in the "Jurisdictional Statement" of the Appellant are so unsubstantial as not to warrant further argument.

Motion is made to dismiss and affirm also on the ground that there are no substantial federal questions presented, in that the questions raised in the lower courts were clearly of local

concern, as the license tax which is the subject of this litigation was directed at local activities which took place within the State of Alabama, namely, the performance of a contract within the State of Alabama. It is the license tax required of all contractors in Alabama who do any of the work in this State described in the taxing statute.

Opinions Below

This is an appeal from a judgment and decree entered by the Supreme Court of Alabama on June 30, 1960, in favor of the Appellee and against the Appellant. The opinion of the Supreme Court together with the judgment and decree of said court are to be found in the Appendix of the Appellant's "Jurisdictional Statement" and on pages 11-31 of the Jurisdictional Statement. The opinion of the Supreme Court of Alabama actually constitutes in itself an excellent brief in support of the Appellee's Motions to Dismiss and to Affirm. The decree of the Circuit Court of Montgomery County, Alabama, In Equity, the Court of first instance, was also in favor of the Appellee, and is to be found on pages 31-33 of the "Jurisdictional Statement," and in the Appendix thereto.

We disagree with the Appellant in its statement to the effect that the Circuit Court rendered no opinion. The Circuit Court did render an opinion, but the opinion was very terse and to the point (R. p. 97), and is, as follows:

> "The Court having considered and understood same, together with the contentions made by the parties in the pleadings, and in their briefs, is of the opinion that the contractors' license levied under Title 51, Section 496, Code of Alabama 1940, as amended,

against the Appellant for the license year beginning October 1, 1952 and ending September 30, 1953, *and as applied to the Appellant in this case, did not violate or abridge in any respect the commerce clause of the Federal Constitution. The license tax as so applied, was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama; namely, executing the contract involved in this state by dredging that portion of the land underneath the surface of Mobile Bay lying between Beacon 24 and Beacon 38, in accordance with a map of Mobile Bay, Alabama*, prepared by the United States Corps of Engineers, Mobile, Alabama. That under the circumstances it appears that Appellant was correctly cited by the state for the license tax for said fiscal year, and that the final assessment made by the Department of Revenue against the Appellant in this cause, was validly made and should be affirmed." (*Emphasis supplied.*)

This holding of the Circuit Court was affirmed in every respect by the Supreme Court of Alabama. (Jurisdictional Statement, Appendix, pages 11-33.)

Jurisdiction

It clearly appears that there is no question of interstate commerce or other federal question involved in this case in that the tax involved was levied and directed at a purely local business activity (the performance of the contract) which took place within the State of Alabama; thus it is respectfully submitted that this Court has no jurisdiction to entertain this appeal except to dismiss same or to affirm the decree and judgment of the State Supreme Court.

The tax involved is levied on all contractors who do any of the work described under Title 51, Chapter 20, Article 1,

Section 496, as amended, Code of Alabama 1940, and has been repeatedly held by the Supreme Court of Alabama to apply mainly, if not entirely, to the privilege of a contractor performing a contract within the State of Alabama,[1] and not to be directed at any of the events which might take place without the State of Alabama.

Statute Involved

The statute involved is Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, which levies a license tax on all contractors who perform work in Alabama of the nature described in the statute, and has been repeatedly held by the Supreme Court of Alabama to be on the privilege of such a contractor performing a contract within the State of Alabama. The Appellant has included the text of this statute in its Jurisdictional Statement, Appendix, pages 33-35.

Question Presented

The Supreme Court of Alabama without a dissenting opinion affirmed the decree of the lower court in holding that the taxing statute involved as applied to the Appellant in this case, did not violate or abridge in any respect the Commerce Clause of the Federal Constitution, in that the tax as so applied, was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama, namely, performing the contract involved in this state. We disagree with the

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[1] *Standard Dredging Corporation v. State of Alabama, decided by Alabama Supreme Court June 30, 1960, not as yet reported (Jurisdictional Statement, Appendix, pages 11-31), Brown Plumbing Company v. McDowell, 240 Ala. 485, 200 So. 104, O'Pry Heating and Plumbing Company v. State of Alabama, 241 Ala. 507, 3 So. 2d 316.*

Appellant then that there is a substantial question involved or that there are substantial federal questions involved under the Commerce and Admiralty Clauses of the Federal Constitution. This state tax is not directed at the equipment used in performing the work under the contract, or the privilege of using such equipment in this state (the equipment used is entirely immaterial; no mention is made at all of equipment in the taxing statute). The lower court has clearly construed the taxing statute to apply only to the privilege of executing the contract by performing the work called for thereunder in the state.

The Facts

We agree that the Appellant is a New Jersey corporation, having its principal office in New York City, and that it has no regular place of business within the State of Alabama. The Appellant voluntarily came into the State of Alabama and voluntarily qualified with the Secretary of State to do business in Alabama, and paid franchise taxes to the State of Alabama for the privilege of doing business in Alabama for the period of time material to this suit. Moreover, the Appellant voluntarily procured a regulatory license from the Alabama Contracting Board, which is a regulatory body created under the police powers of this state, and which has nothing whatsoever to do with the taxing statute involved in this case or the enforcement thereof, but is entirely an independent agency. (R. pp. 20-21.)

The fact, however, remains that the Appellant was qualified to do business in Alabama, and was also licensed under its regulatory laws to practice general contracting in Alabama, at

all times pertinent to this suit. Its actions in this respect were of its own volition. (R. pp. 20-21.)

On April 29, 1953, Appellant contracted with the Department of the Army, Corps of Engineers, Mobile District, Mobile, Alabama, to remove the earth and all other material from the bottom of Mobile Bay lying above the plane of 34 feet below mean low tide, over a bottom-width of 200 feet and an overwidth strip of 20 feet along the west edge of the 200-foot channel from Station No. 38 to approximately Station No. 24, and with an overall total distance to be dredged and excavated of about 56,245 feet, for the consideration named in the contract. (R. pp. 45-46.) While the contract in the first instance was prepared by the Corps of Engineers at Mobile, Alabama, it was sent to the Appellant's New Orleans office, and thence transmitted to its New York office where it was signed by one or more of its officials, and was then returned to the Corps of Engineers at Mobile, Alabama where it was approved and signed by the District Engineer. (R. p. 28.) It will be noted by examining this "contract for construction," which appears on pages 46-87, inc., of the Record, that it covers only excavating and dredging operations as to a portion of the bottom of Mobile Bay. It does not in any respect designate or describe the equipment with which the contract was to be performed, and leaves the matter of the equipment to be used entirely up to the contractor. Thus, importance was given to the excavating work to be performed under the contract, and not in any respect to the equipment or type of equipment which was to be used in doing the work called for under the contract.

The Appellant through its Counsel admitted that Mobile Bay is within the territorial jurisdiction of Alabama, and that the

actual work under the contract was performed by it in Alabama by dredging and excavating earth and other materials from the bottom of Mobile Bay from Station 38 southward to Station 24, as is shown on the map prepared by the United States Corps of Engineers, Mobile, Alabama. (Exhibits 5 and 6, R. p. 21.) The evidence then is undisputed that such excavation and dredging work was performed under the contract by the Appellant entirely within the State of Alabama. (R. pp. 25 and 28.)

The contractors license tax, levied against the Appellant in this case under the provisions of Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, has continuously been construed by the Supreme Court of Alabama to be directed at the performance of the contract, in whole or in part, in Alabama, or at the privilege of performing the contract within the State. (See Jurisdictional Statement, Appendix, pages 16-21.) The evidence also shows without contradiction that the State Department of Revenue has also as a matter of administrative construction of the taxing statute applied it only to cases where the contractor does the work or performs the contract, in whole or in part, within the State of Alabama. (R. pp. 31-33, inc., Jurisdictional Statement, Appendix, pages 19-21.)

The license tax statute, namely, Section 496, as amended, supra, does not levy in any respect a tax on equipment or the privilege of using any type of equipment in Alabama. In this respect, and insofar as is pertinent to the situation in this case, the license statute mentions only contracts, ***"to excavate earth, rock or other material for foundations or for any other purpose"***. This statute also provides that where a contractor

has no office in this state, "then he shall procure such license from the Probate Judge of the county where the contract *is to be performed*". (See Text of Statute, Jurisdictional Statement, Appendix, pages 33-35.) We also reiterate in this connection that not even the "contract for construction" involved in this case requires that the contractor use any designated or specific type of equipment, nor does it give any importance to the type of equipment to be used by the contractor. Thus, the choice and selection of the equipment to be used in performing the contract is left entirely up to the contractor.

No attempt has been made by the State to license or tax in any respect the dredges or the tug boats used by the Appellant to tow the dredges from place to place. A reading of the text of the taxing statute (Jurisdictional Statement, Appendix, pp. 33-35) will plainly show that neither the levy nor the measure of the tax touches any of the equipment used by the contractor.

The Question is not Substantial

The Circuit Court in this case clearly held that the contractors license tax (a tax levied by the state on all contractors who perform any of the work in this state described in the taxing statute) levied under Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, as applied to the Appellant in this case:

> ". . . did not violate or abridge in any respect the Commerce Clause of the Federal Constitution. ***The license tax as so applied was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama; namely, executing the contract in this state by dredging that portion of the land underneath the surface of Mobile Bay, lying***

between Beacon 24 and Beacon 38, in accordance with a map of Mobile Bay, Alabama, prepared by the United States Corps of Engineers, Mobile, Alabama." (Emphasis supplied.)

This not only appears to have answered all questions of any consequence in the case, but also serves to define what might be considered as the material issues.

Section 496, as amended, of Title 51, Code of Alabama 1940, confines its levy insofar as the statute is pertinent to this case to the privilege of the contractor performing a contract in this state, in whole or in part, "to evacate earth, rock or other material for foundations or any other purpose". (Jurisdictional Statement, Appendix, pp. 33-34.)

The Supreme Court of Alabama has consistently construed the taxing statute to be directed at the execution or the performance of the work called for under the contract. In this respect, the State Supreme Court has refused to allow the taxing statute to be applied in cases involving only the negotiations leading up to the making of a contract or the mere signing of a contract, *unless the work under the contract was also performed in Alabama in whole or in part. Standard Dredging Corporation v. State of Alabama*, (Jurisdictional Statement, Appendix, pp. 11-30), *O'Pry Heating and Plumbing Company v. State*, 241 Ala. 507, 3 So. 2d 319 (1941), and *Brown Plumbing and Heating Company v. McDowell*, 240 Ala. 485, 200 So. 104, (1941).

> "We think a fair and reasonable interpretation of Section 496, when considered in connection with related statutes and the long standing administrative

> interpretation, *is that it requires a license on the performance of a contract and not just its acceptance.*" *(Emphasis supplied.) Standard Dredging Corporation v. State of Alabama,* (Jurisdictional Statement, Appendix, p. 17.)

In the case of *Spector Motor Service v. O'Connor,* 304 U.S. 602, 608, 71 S. Ct. 508, 512, and in other cases, this Court has given considerable weight to the interpretation of the state statute by the highest Court of the State involved.

> "Answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer." 304 U. S. 608, 71 S. Ct. 512.

This taxing statute then has been held by the highest Court in Alabama to be directed at the privilege of the contractor performing the work called for under the contract, in whole or in part, within the State of Alabama. Therefore, as applied in this case, it is said to be directed at the local activity and privilege of the contractor performing the contract within the State by removing the earth, rock, and other material from the land underneath Mobile Bay to the extent called for under the contract. It is true that some of the negotiations leading up to the signing of the contract took place in other states, and that the contract was actually signed on the part of Standard in New York. The contract was not finally accepted though until it was returned to Mobile, Alabama and signed there by the District Engineer. Some of the necessary paper work was done in New Orleans. These things, however, in accordance with interpretation placed on the taxing statute by the Supreme Court of Alabama are not the things at which the tax is directed. The activity at which the tax is directed has been held to

be the performance of the contract in whole or in part within the State of Alabama. The evidence is undisputedly to the effect that from a physical standpoint the work under the contract was performed entirely within the State of Alabama. (R. pp. 26, 28, and 45-46.)

The Alabama Court also clearly deems the performance of the contract and the work done thereunder wholly within the State, a sufficient nexus, separate and apart from the Appellant's other activities, at which the tax can be validly directed, and within the sphere of the taxing powers of the State. This conclusion on the part of the Alabama Court also appears to be fully in accord with the majority of the decisions of this Court.

> "The state is not precluded from imposing taxes upon other activities or aspects of this business, which unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from the petitioner's interstate business, provided that their tax is so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."
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> *Spector Motor Service v. O'Connor*, 304 U.S. 602, 609, 71 S. Ct. 508, 512.

Also see *Northwestern States Portland Cement Company v. State of Minn.*, 353 U. S. 450, 79 S. Ct. 357.

Interstate Oil Pipe Line Company v. Stone, 337 U. S. 662, 69 S. Ct. 1264.

Memphis Natural Gas Company v. Stone, 335, U. S. 80, 68 S. Ct. 1475.

Central Greyhound Lines, Inc. V. Mealey, 334 U. S. 653, 68 S. Ct. 1260.

Caskey Baking Company v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 883.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546.

Scripto, Inc. v. Carson, (Decided March 21, 1960), 80 S. Ct., 619.

This appears to be clearly a case where the tax is directed at a local activity which takes place entirely within the taxing state, and certainly one that can be readily separated from the Appellant's other activities, and so-called interstate activities. This Court has repeatedly upheld the right of a state to tax such local activities. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, *Scripto, Inc. v. Carson*, (Decided March 21, 1960), 80 S. Ct. 619, among a number of others.

> "It seems to us that the local activity of performing the contract in Alabama can realistically be separated from the interstate process or flow of commerce [assuming that Standard's overall activities here involved constituted interstate commerce]. The tax incidence is the performance of the contract in the State It is not laid upon any other phase of Standard's activities. It is applicable alike to resident and nonresident contractors. There is no discrimination whatever against nonresidents. The performance of the contract admittedly was wholly within Alabama territory, without any possibility of any other state imposing a tax on such performance We fail to see any unconstitutional burden or discrimination in the application of the license in this case. "See Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876; Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S. Ct. 881, 85 L. Ed. 1223."

See decision of Alabama Supreme Court, Jurisdictiona. Statement, Appendix, pp. 22 and 23.

The foregoing represents the interpretation by the Supreme Court of Alabama of this local law and the facts as found by that Court upon which it founded its judgment.

This Court in one of its latest decisions, namely, *Scripto, Inc. v. Carson*, (Decided March 21, 1960), 80 S. Ct. 619, 621, said this in regard to such a construction by a State Court of its local laws:

> "The application by that court of its local laws and the facts on which it founded judgment are of course controlling here. General Trading Co. v. State Tax Comm., 1944, 322 U.S. 335, 337, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309."

Navigable Waters

The question has been well settled, since the inception of this Union that the title to and right of control of the soil under tidal and navigable waters are in the several states, where such waters are within their territories, subject to the right of the Congress and the Federal Government to regulate commerce and navigation on such waters. *Oklahoma v. Texas*, 258 U.S. 574, 42 S. Ct. 406, *Seattle v. Oregon & W. R. Co.*, 255 U.S. 56, 41 S. Ct. 237, *Borax Consolidated v. Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, Rehearing Denied in 296 U.S. 664, 56 S. Ct. 304. 56 Am. Jur., Sections 241 and 453, pp. 698 and 865. The soil under Mobile Bay and the waters themselves are as much a part of the State of Alabama and within its territorial jurisdiction as Bienville Square in the City of Mobile or the Court House in Birmingham, subject only to the rights of the Federal Government to control commerce and navigation on such waters. The fact that the Federal Government has the

right to control navigation and commerce on Mobile Bay certainly does not mean that it is not still a part of the State of Alabama, or that the State has ceded exclusive jurisdiction over such territory to the Federal Government. The State still retains the right to tax on its said territory and to assert certain controls thereover relating to conservation and otherwise. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S. Ct. 465.

The fact then that in the case of *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, the Circuit Court of Appeals for the Ninth Circuit has for the purpose of the Federal Fair Labor Standard Act held that employees of a company dredging or doing other work on the navigable waters within the territory of a State were engaged in interstate commerce for the purpose of the Wage and Hour Laws, would clearly not deprive the State from taxing or asserting jurisdiction and certain controls on its said territory. The State would still clearly have such jurisdiction thereover, unless it had ceded all of its jurisdiction in this respect to the Federal Government. This certainly has not happened in the case of Mobile Bay. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, and *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S. Ct. 465.

The Federal License

The Appellant's argument in this respect indeed seems far fetched. An examination of Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, will clearly disclose that this taxing statute does not in any respect levy or attempt to levy a license or any other type of tax on the

Appellant's dredges and tug boats or any other equipment which might have been used by the Appellant in performing the contract within the State of Alabama. The license tax involved is levied upon and directed at the privilege of performing a contract within the State of Alabama, without any significance being given whatsoever to the type of equipment or as to what equipment is used by the contractor. Whether the Appellant used tug boats which were licensed and registered by the Federal Government in doing this work in Alabama is entirely immaterial insofar as the levy made under the taxing statute is concerned. Even by the wildest stretch of the imagination it is hard to see how this taxing statute could in any respect interfere with or impair the federal licenses and registrations as to these tug boats. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813. The Supreme Court of Alabama in its opinion rendered in this case has clearly answered the Appellant's argument in this respect. See Jurisdictional Statement, Appendix, pp. 27-30.

We respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the State Court should be affirmed or in the alternative this appeal be dismissed.

MacDONALD GALLION, Attorney General for Alabama

GUY SPARKS, Special Assistant Attorney General for Alabama

Of Counsel for Appellee

WILLIAM H. BURTON, Assistant Attorney General for the State of Alabama

Counsel for Appellee

Proof of Service

We, MacDonald Gallion and William H. Burton, two of the Attorneys for the Appellee, State of Alabama, in this cause, hereby certify that on the _____ day of September, 1960, we served copies of the foregoing motion to affirm or motion to dismiss on Honorable Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans 12, Louisiana, as Counsel for the Appellant, Standard Dredging Corporation, by mailing a copy of same to him in a duly addressed envelope, with first class postage prepaid, United States mail.

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